90-1779

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TELESAVER, INC. and VISTA TECHNOLOGIES, INC.,
Petitioners

v.

UNITED STATES TRANSMISSION SYSTEMS, INC.,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the District Court commit error of constitutional dimension by denying the prayer for jury trial of Plaintiff and Counterclaim Defendant, Vista Technologies, Inc., and by improperly attributing to it the waiver of a separate and distinct party?

PARTIES TO THE PROCEEDINGS

Petitioners and appellants below are Telesaver, Inc. and Vista Technologies, Inc. Respondent and appellee below is United States Transmission Systems, Inc. which was a wholly-owned subsidiary of ITT Communications Services, Inc., required to be listed pursuant to Rule 28.1.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Telesaver, Inc. ("Telesaver") and Vista Technologies, Inc. ("Vista") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled proceeding on February 21, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the United States District Court for the District of Maryland is unreported and is reprinted in the Appendix hereto ("App.") at 1a.

The final opinion and judgment of the United States District Court for the District of Maryland is unreported and is reprinted at App. 3a. The unreported letter order

of the United States District Court for the District of Maryland (Young, J.) denying a right to jury trial is reprinted at App. 41a.

The opinion of the United States Court of Appeals for the Fourth Circuit denying request for rehearing in banc is unreported and is reprinted at App. 42a.

JURISDICTION

This proceeding was initiated in the United States District Court for the District of Maryland and jurisdiction is provided by 28 U.S.C. § 1332. The United States District Court for the District of Maryland denied Plaintiff and Counterclaim Defendant the right to a jury trial. After a timely appeal, the Fourth Circuit Court of Appeals affirmed the decision of the District Court.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Rule 38 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Right Preserved.
>
> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand.
>
> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action not later than 10 days after the service of the last pleading directed to such issue.

Rule 39 of the Federal Rules of Civil Procedure, provides in pertinent part:

> (b) By the Court.
>
> Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

STATEMENT OF THE CASE

This action was initiated by Telesaver on July 22, 1986 with the filing of a Complaint in the United States District Court for the District of Maryland against United States Transmission Systems, Inc. ("USTS") for breach of the Sales and Marketing Agreement ("the Agreement") executed by and among Telesaver and USTS on December 17, 1984 and later by Vista on January 14, 1985 as an added party to the modified agreement ("Agreement Modification") and for fraud and negligent misrepresentation. At the time Telesaver filed the Complaint, Vista, Telesaver's parent company, was in a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the District of Maryland, having filed for bankruptcy on April 28, 1986, shortly after the Agreement was terminated. USTS answered the Complaint, and asserted seven counterclaims against Telesaver and added as a Counterclaim Defendant to the action, Richard J. Goldman, President of Telesaver and Vista.

Vista sought and obtained permission from the Bankruptcy Court to join the litigation against USTS. On October 9, 1986, with leave of the United States District Court for the District of Maryland, an Amended Complaint was filed against USTS. The Amended Complaint added Vista as a party-plaintiff, pursuant to the terms of the Agreement Modification. On October 20, 1986, USTS filed an Answer to the Amended Complaint, and

on January 5, 1987, USTS filed an Amended Counterclaim adding Vista as a Counterclaim Defendant on all counts.

Telesaver and Goldman answered the Amended Counterclaims on February 2, 1987. On April 3, 1987, after unsuccessfully moving to dismiss the Amended Counterclaim, Vista filed its Answer to the Amended Counterclaim and demanded a jury trial as to all the issues. Vista, in its Answer, made a timely jury trial demand in accordance with Federal Rules Civil P. 38. Almost nine months later, on December 24, 1987, USTS moved to strike the request for a jury trial. The lower court entered a letter order on March 1, 1988 denying Vista's request for a jury trial.

The case proceeded to trial without a jury and on March 6, 1990, the lower court issued an Opinion and Order entering judgment in this case in favor of USTS. After a timely appeal, the Fourth Circuit Court of Appeals summarily affirmed the decision of the District Court. The Fourth Circuit subsequently denied Plaintiffs' request for rehearing in banc.

REASONS FOR GRANTING THE WRIT

THE LOWER COURT'S DENIAL OF VISTA'S TIMELY REQUEST FOR JURY TRIAL IS REVERSIBLE ERROR

The issue presented here, the right to a jury trial, is one of the most sacrosanct and fundamental rights guaranteed by the Seventh Amendment to the United States Constitution. Vista timely prayed for a jury trial in its reply to USTS' Amended Counterclaim.

USTS moved to strike the jury trial demand arguing that Vista and Telesaver were the same entity and that 'Telesaver's earlier waiver of its right to a jury trial should be imputed to Vista. Vista and Telesaver opposed the motion and presented uncontroverted evidence of the

separate corporate identities of Vista and Telesaver. On March 1, 1988, the lower court denied Vista's jury demand on the sole basis that no new issues were raised in the Complaint. There was no finding that Vista and Telesaver were the same entity or that they were so related that a waiver by one was binding on the other. Absent a finding that Vista and Telesaver were the same entity, the lower court's denial of Vista's demand for jury trial was patently in error.

In affirming the decision of the trial court, the Fourth Circuit Court of Appeals failed to scrutinize the curtailment of the right to a jury trial with the required "utmost care". *See Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S. Ct. 75 (1935). The panel also failed to exercise the exacting scrutiny mandated upon review of a lower court's denial of a jury trial demand. *See King v. United Benefit Fire Insurance Co.*, 377 F.2d 728, 731 (10th Cir.) *cert. denied*, 389 U.S. 857 (1967). A review of the record with exacting scrutiny would have revealed that the denial by the lower court of Vista's right to a jury trial was improper, because Vista made a timely demand for jury trial pursuant to Federal Rule Civil P. 38.

Vista and Telesaver were separate corporate entities, each having filed with the State Department of Assessments and Taxation articles of incorporation. USTS did not contest the separate corporate filings or present evidence sufficient to pierce the corporate veils of Vista and Telesaver. Defendants merely argued that Vista and Telesaver did not "operate" as separate entities. However, USTS did not dispute that the separate corporate entities were maintained. A corporation is entitled to enjoy the same rights as an individual to trial by jury. *United States v. Troxler Hosiery Co., Inc.*, 681 F.2d 934, 935, n.1 (4th Cir. 1982). The filings of articles of incorporation establish the existence of a corporation as a separate entity. *Dixon v. Process Corporation*, 38 Md. App. 644, 655, 382 A.2d 893, 899-900, *cert. denied*, 282

Md. 731 (1978). Maryland law, applicable in the instant case, provides that a corporate entity may be disregarded "only when necessary to prevent fraud or enforce a paramount equity." *Bart Arconti & Sons, Inc. v. Ames-Ennis, Inc.*, 275 Md. 295, 312, 340 A.2d 225, 235 (1975). Maryland law establishes that every separate corporation has the power to sue, be sued, complain and defend in all courts in its own behalf. Md. Corps. & Assoc. Code Ann. § 2-103(2). Maryland law further establishes that even a wholly-owned "subsidiary corporation, for whatever purpose it may exist, is a separate corporate entity." *Food Fair Stores v. Blumberg*, 234 Md. 521, 529, 200 A.2d 166, 177 (1964); *See also Levitt and Sons, Inc. v. Swirnow*, 58 F.R.D. 524, 530 (D. Md. 1973).

As a separate party, Vista's right to a jury trial is guaranteed under the Seventh Amendment which protection can only be waived knowingly and intentionally. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938); *National Equipment Rental v. Hendrix*, 565 F.2d 255, 258 (2nd Cir. 1977); *Civil v. Waterman Steamship Corp.*, 217 F.2d 94, 97 (2nd Cir. 1954). A newly added party to an action has an unconditional right to a jury trial even if the original parties waived that right, as the new party had no standing to assert a jury trial demand before he was added to the case. *See Butterfield v. Crist*, 52 F.R.D. 489, 490 (E.D. Wis. 1971) (Court held that jury demand of defendant added to action was timely even though original defendants failed to timely demand jury trial); *Swofford v. B & W, Inc.*, 34 F.R.D. 15 (S.D. Tex. 1963), *aff'd*, 336 F.2d 406 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S. Ct. 653 (1965). (Failure of original plaintiff to demand jury trial did not operate as a waiver by the subsequently added plaintiffs); *Rupe v. Fourman*, 532 F. Supp. 344, 351 (S.D. Ohio 1981) (Defendant landlord's waiver of trial by jury did not bind two other defendants added by plaintiff's amended complaint); *Mortenson v. Pacific Far East Line, Inc.*,

148 F. Supp. 71, 72 (N.D. Cal. 1956) ("any prior supposed waiver . . . by one plaintiff cannot, of course, bind another plaintiff.") *See also* C. Wright & E. Miller, *Federal Practice and Procedure*, § 2321, at 104 (1971) ("A waiver by one party cannot bind other parties.")

The failure to grant a jury trial is reversible error. When a jury trial is timely demanded, the lower court's denial of the request requires the reversal of the lower court decision and that a new trial be granted. *See First Wisconsin National Bank of Rice Lake v. Klapmeier*, 526 F.2d 77, 80 (8th Cir. 1975).

Even if this Court finds that the jury demand was not timely made, the lower court's denial of the demand must be reversed as an abuse of discretion. "Trial by jury is a vital and cherished right, rulings with respect to which are subject to exacting scrutiny on appeal." *King v. United Benefit Fire Insurance Co.*, 377 F.2d 728, 731 (10th Cir.) *cert. denied*, 389 U.S. 87 (1967).

The right of jury trial is so fundamental that courts must "indulge every reasonable presumption against waiver." *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 811-812 (1937). As the Fifth Circuit held in *Swofford v. B & K, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964):

> The right to a jury in a federal court as declared by the Seventh Amendment is a basic and fundamental feature of our system. And when the discretion of the court is invoked . . . the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.

In this case, even assuming untimeliness of the jury trial demand, there were no strong or compelling reasons to deny the request for jury trial. The issues to be determined in this case were simple issues which juries typically determine, and the essential issues in the case were largely factual. There was no prejudice claimed by

the Defendant in its memoranda opposing the jury demand nor would there have been any prejudice, as the jury demand was made very early in the proceedings (indeed, it was made in the pleading stage), and a jury trial demand would have had no effect on the court's docket (the trial actually occurred over three years after the jury demand was made). As such, the denial of the jury demand was an abuse of discretion. Accordingly, the lower court's denial of the request for a jury trial should be reversed and a new trial granted.

CONCLUSION

This case presents fundamental issues concerning the assertion of the right to a jury trial, and the relationship between state law (defining the separateness of corporate parties) and federal law (allowing each separate party to demand a jury trial). The District Court's error was clear and fundamental. This Court should grant the writ and reverse the decision below.

Respectfully submitted,

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May 22, 1991

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3502

TELESAVER, INCORPORATED;
VISTA TECHNOLOGIES, INCORPORATED,
Plaintiffs-Appellants,

versus

UNITED STATES TRANSMISSION SYSTEMS, INCORPORATED,
Defendant-Appellee,

and

RICHARD J. GOLDMAN,
Counterclaim Defendant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore,
Norman P. Ramsey, District Judge,
(CA-86-2300-R)

Argued: December 3, 1990 Decided: January 22, 1991

Before PHILLIPS and NIEMEYER, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Franklin Terrell Caudill, SEMMES, BOWEN & SEMMES, Baltimore, Maryland for Appellants. John Sargent Kinzey, Jr., LEBOEUF, LAMB, LEIBY & MACRAE, New York, New York, for Appellee. ON BRIEF: Harry M. Rifkin, SEMMES, BOWEN & SEMMES, Baltimore, Maryland, for Appellants. John M. Aerni, LEBOEUF, LAMB, LEIBY & MCRAE, New York, New York; Michael D. Berman, KAPLAN, HEYMAN, GREENBERG, ENGLEMAN & BELGRAD, P.A., Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Telesaver, Inc. and Vista Technologies, Inc. appeal on a multitude of grounds the decisions of the district court in the resolution of this case which dealt principally with an alleged breach of contract. Our review of the record and the district court's opinions discloses that this appeal is without merit. *Telesaver, Inc. v. United States Transmission Systems, Inc.*, CA-86-2300-R (D. Md. March 7, 1990); *Telesaver, Inc. v. United States Transmission Systems, Inc.*, 687 F. Supp. 997 (D. Md. 1988). Finding no error on the part of the district court, we affirm.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. R-86-2300

TELESAVER, INC., *et al.*,
Plaintiffs/Counterclaim Defendants

v.

UNITED STATES TRANSMISSION SERVICE, INC.,
Defendant/Counterclaim Plaintiff

OPINION

[Filed Mar. 6, 1990]

This litigation arises out of a failed attempt by a large multinational corporation and an energetic up-start company to join forces to capitalize on the business opportunities presented by the break-up of AT&T. United States Transmission Systems, Inc. ("USTS"), a wholly-owned subsidiary of ITT Corporation, and Telesaver, Inc. ("Telesaver"),[1] formed a relationship in late 1984 in which Telesaver transferred its existing long distance telephone customers to USTS and solicited new long-distance customers for USTS. Both parties had high hopes that this arrangement would lead to large profits as long-time AT&T customers signed up with new long-distance carriers.

The venture, however, was plagued from the outset by the parties' clash of corporate cultures and business perspectives. Both parties agree that the transfer of Telesaver's customer base to USTS was beset by prob-

[1] Telesaver was a subsidiary of Vista Technologies, Inc. also a plaintiff/counterclaim defendant herein.

lems, the result being that a significant proportion of Telesaver's customers never were successfully transferred to USTS. The parties also agree that many of the new customers obtained by Telesaver for USTS never received USTS long-distance service. It was apparent by the summer of 1985 that the Arrangement was not working out. Rather than scrapping the relationship, USTS and Telesaver restructured their relationship by a new contract, referred to by the parties as the "Fourth Addendum." The problem, nevertheless, continued unabated. By early 1986, both parties recognized that their business venture was a disaster. Beyond this common recognition, however, the parties bitterly dispute why their venture failed; indeed, both have almost diametrically opposed versions of the events leading to the ultimate termination of the contract in March, 1986. Telesaver brought this suit, and USTS counterclaimed, in an attempt to resolve the controversy.

Telesaver filed its complaint on July 22, 1986, and then amended the complaint to include Vista as a plaintiff on October 8, 1986. In the Amended Complaint, Telesaver set forth five counts: (1) breach of the sales and marketing portion of the contract; (2) fraudulent misrepresentations throughout the relationship; (3) negligent misrepresentation throughout the relationship; (4) recision of the Fourth Addendum; and (5) breach of the customer transfer portion of the contract. In its answer, USTS denied liability on each count and counterclaimed against Telesaver and Telesaver's president, Richard Goldman. USTS set forth seven counterclaims, as follows: (1) breach of the original contract; (2) breach of the Fourth Addendum; (3) breach of fiduciary duty; (4) fraud in the inducement of the original contract; (5) fraud in the inducement of the Fourth Addendum; (6) violation of the Racketeer Influenced Corrupt Practices Act ("RICO"); and (7) restitution if the addendum was rescinded. USTS filed an Amended Answer on

October 20, 1986, and Amended Counterclaims on January 5, 1987, which essentially restated its original ones.

The issues ultimately tried, however, were much narrower. By Letter Order of March 30, 1987, Judge Young, *inter alia*, dismissed USTS's RICO counterclaim for lack of substantiation. (Docket Entry No. 35). Later, on July 6, 1988, Judge Young issued a Memorandum and Order, reported as *Telesaver, Inc. v. United States Transmission Services, Inc.*, 687 F. Supp. 997 (D. Md. 1988), that resolved the parties' cross-motions for summary judgment.[2] The original contract included a consequential damages disclaimer and a settlement provision, each of which Judge Young held valid. In upholding these provisions, Judge Young granted summary judgment in favor of USTS with respect to Telesaver's claims for consequential damages and with respect to Telesaver's claims, *other than for fraud*, against USTS for its acts or omissions *before September 13, 1985*, the date of the Fourth Addendum. Finally, Judge Young entered judgment in favor of USTS with respect to Telesaver's claim for rescission and mooted USTS corresponding amended counterclaim for restitution. Telesaver's motion for reconsideration of this Opinion was denied by Judge Young on December 1, 1988. (Docket Entries Nos. 89 & 90). In its portion of the pre-trial order, USTS indicated that it was abandoning all of its amended counterclaims except for its first and second amended counterclaims insofar as it sought repayment for amounts that USTS allegedly over-advanced to Telesaver. *See* Pretrial Order at 50.

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[2] As the litigants were informed at the outset of this trial, all of Judge Young's rulings in this matter stand as the law of the case. *See* Trial Transcript at 17-19 (hereinafter "Tr. at ——"). The recitations here of Judge Young's holdings are in no way intended to alter or amend the Opinions of Judge Young.

Thus, when the case was tried before this Court,[3] Telesaver's Amended Complaint consisted of four counts. Count I alleged breach of the Sales Agreement in the Original Contract and the Fourth Addendum; Count II alleged fraudulent misrepresentation in the course of parties' relationship; Count III alleged negligent misrepresentation in the course of parties' relationship; and Count V alleged breach of the Customer Transfer portion of the Contract.[4] Telesaver's prayers for damages were explained as follows in Telesaver's Proposed Findings of Facts and Conclusions of Law:

(1)	Lost commissions on actual sales during original contract period:	$ 780,026
(2)	Lost commissions on actual sales during Fourth Addendum period:	2,606,347
(3)	Lost commissions on lost sales during original contract period	5,378,133
(4)	Lost commissions on transferred accounts	549,255
(5)	Lost commissions on lost sales after the Fourth Addendum period:	10,519,212
(6)	Consequential damages for negligent and fraudulent misrepresentation	2,831,128
	TOTAL	$22,664,101

Id. at 85-86. Telesaver also sought punitive damages in double the amount of the compensatory damages (prayers (1) through (5)), amounting to $39,665,946. *Id.* at 86. USTS, on its counterclaim, sought $224,055.82 for Telesaver's breach of the original sales agreement and $59,097 for Telesaver's alleged breach of the Fourth Addendum. Both these sums represent the amount that USTS claims it "overadvanced" to Telesaver.

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[3] This case was transferred from Judge Young's docket to this Court's docket on July 14, 1988 when Judge Young assumed senior status. Judge Young, at this Court's request, ruled on Telesaver's motion for reconsideration filed July 19, 1988, because of his greater familiarity with the relevant issues at the time.

[4] The Court will retain the original numbering of the Counts in the Amended Complaint.

Upon careful consideration of the testimony and documentary evidence presented at trial, the post-trial briefs filed by the parties, and the final arguments of counsel, the Court is now prepared to rule. The Court is well aware of its duty under Rule 52(a) of the Federal Rules of Civil Procedure to make specific findings of fact and conclusions of law. Any findings of fact contained in the conclusions of law, and any conclusions of law contained in the findings of fact, shall be received in their true light.

FINDINGS OF FACT [5]

Before Telesaver and USTS formed the relationship that gave rise to this litigation, Telesaver was in the business of providing long-distance service in a few geographic "clusters" around the country.[6] Using Telesaver switching equipment and software, Telesaver's customers would place long-distance calls that were actually transmitted over lines provided by other long-distance carriers,

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[5] For the purposes of this Opinion, the Court will relate its findings of fact in the chronological order of events in the relationship between Telesaver and USTS, which is not, necessarily, the order of the testimony presented.

Witnesses who appeared at trial on behalf of Telesaver were Richard Goldman, Telesaver's President (Tr. 1-389, 1720-1775); Sharon Sagal, a personnel specialist at Telesaver (Tr. 389-468); Brian Tenberg, Telesaver's Director of Computer Systems and Data Processing (Tr. 474-536); David Brown, Telesaver's Western Regional Manager (Tr. 549-621); Michael Metzger, Telesaver's Comptroller (Tr. 627-689); Marshall Sapperstein, Director of Sales and Markting for Telesaver's Branch Offices (Tr. 689-734); Leonard Moskowitz, Telesaver's Vice President for Human Relations (Tr. 741-871); and Howard Paul, plaintiff's expert on the telecommunications industry (Tr. 923-1230). USTS's witnesses were Wayne Robins, President of USTS (Tr. 1232-1539); Lawrence White, a technical specialist at USTS (Tr. 1544-1613); and Jeffrey Lobel, a Product Manager at USTS (Tr. 1620-1704).

[6] Telesaver had operations in several locations, including Philadelphia and Wilkes-Barre, Pennsylvania; New York City and northern New York state; northern New Jersey; Columbia, Maryland; San Francisco, California; and Norfolk, Virginia.

including USTS. In 1984, despite having over 180 employees and gross revenues estimated at $20 million, Telesaver developed serious cash-flow problems. Telesaver's President and founder, Richard Goldman, described the company's financial conditions as being "the pits." Tr. at 46. As a result, Telesaver explored various options to increase its cash-flow or decrease its expenses. Soon, Telesaver settled on the idea of selling its customer base to one of the established long-distance carriers. To that end, Telesaver negotiated with USTS, U.S. Telecom, Sprint, and Budget-Tel for the purchase of Telesaver's customer base.

I. The Initial Contract Period (Dec. 17, 1984—Sept. 13, 1985)

Negotiations between USTS and Telesaver began in the fall of 1984. Telesaver was represented by its President, Richard Goldman, and by its Executive Vice President, Robert Chertkoff. USTS was represented by the President of USTS, Wayne Robins, and two senior USTS officials, Ranjit Khosla and Rajaram Kaushik. Several face-to-face meetings and telephone conferences were held in order to hammer out a final agreement. The negotiations ultimatly resulted in the original contract between Telesaver and USTS (hereinafter, the "Contract") being entered into on December 17, 1984. Plaintiff's Exhibit 59 (hereinafter "Pltf. Exh. —").

A. The Contract

The December 17, 1984, Contract between USTS and Telesaver consisted essentially of two parts: an agreement by which Telesaver would transfer to USTS certain of its customer bases, (the "Customer Transfer Agreement"), and an agreement by which Telesaver would act as a non-exclusive sales representative for USTS in certain geographic areas (the "Sales Agreement"). The Customer Transfer Agreement provided that Telesaver

would transfer its service agreements with customers in Rochester, New York; New York City, New York; Norfolk, Virginia; San Francisco, California; and Philadelphia, Pennsylvania on specified dates in early 1985. *See* Pltf. Exh. 59, paras. 1.1, 2.1-2.6. The compensation terms, which were a particularly important and carefully negotiated portion of the Contract, provided a fairly complex scheme of transmission credits, cash advances, cash payments, and subsequent accountings. *See* para. 3.0-3.2.3. The compensation scheme was devised to be "front loaded"; that is, Telesaver would receive a large infusion of cash early on, and then, as usage occurred over the ensuing months, the cash advances to Telesaver would be checked against actual usage to determine whether USTS owed Telesaver more money in commissions or, on the other hand, Telesaver had to reimburse USTS for amounts over-advanced. The compensation provisions were designed in this manner to relieve Telesaver's immediate cash-flow difficulties.

The Sales Agreement portion of the Contract provided that Telesaver would market and sell USTS "longer-distance" service in the specified business areas beginning February 1, 1985. USTS retained the right to accept or reject Telesaver sales, but acceptance of such sales was not to be unreasonably withheld. Pltf. Exh. 59, para. 4.4. The compensation scheme of this portion of the Contract was, like the Customer Transfer portion, a complex mix of cash payments, cash advances, and transmission credits. Telesaver was permitted to draw advances of approximately $100,000 per month; ultimate compensation was to be determined by usage generated six months after the new user began receiving service. Pltf. Exh. 59, paras. 5.2-5.6.

The Contract also contained, *inter alia*, two provisions relevant to both aspects of the Telesaver/USTS agreement. First, paragraph 3.1 provided, in pertinent part, that "neither party shall be liable for any indirect, spe-

cial, or consequential damages as a result of a breach hereof." Second, paragraph 2.3 provided that the law of New Jersey, USTS principal place of business, would apply to construe and enforce the contract.[7]

B. Customer Transfer

With respect to the Customer Transfer portion of the Contract, both USTS and Telesaver were obligated to fulfill a series of complex chores on its own and in coordination with each other in order for the transfer to run smoothly. It is quite obvious from the testimony presented, however, that the transfer of customers was, at best, bungled.

A number of problems stand out. First, USTS encountered difficulties in actually "cutting-over" Telesaver customers from Telesaver to USTS. USTS did not have sufficient physical capacity to handle the influx of new accounts and users. The experience with the Rochester, New York, customer base is especially noteworthy. USTS was able to meet its target date of April 1, 1985, for the cut-over to USTS of Telesaver's existing customers in the Rochester area. This resulted in an amendment to the original contract, *see* note 7, *supra*, as well as the loss of some existing Telesaver customers.[8] In addition, the cut-over date for New York and Philadelphia also had to be pushed back a month, from February 1, 1985, to March 1, 1985. Pltf. Exh. 340.

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[7] Soon after the contract was entered into, two modifications were made to it. First, in January, 1985, the parties agreed to add Vista Technologies, Inc., Telesaver's parent corporation, as a party to the contract. Pltf. Exh. 61. Second, the Contract's customer transfer provision pertaining to the Rochester customer base was amended to provide for a later cut-over date. Pltf. Exh. 60.

[8] Even more egregious problems were encountered with respect to the transfer of the San Francisco customer base. These difficulties, however, were the subject of a separate settlement and are not part of this litigation. *See* Amended Complaint, para. 81.

Second, USTS was beset with internal problems that impaired its ability to provide service to the customers transferred to it from Telesaver. USTS performance in providing codes to customers so that these customers could access the USTS long distance service was poor; it often took more than a week for the codes to reach the customer and, to complicate matters, USTS had no follow-up mechanism in place to be certain that the transferred customers received their new USTS codes. In addition, for those customers who were to receive "autodialers" (particularly business customers), USTS's performance was deficient because USTS did not have an adequate supply of the autodialers on hand to send to customers. For these customers, codes were not sent until the autodialers were installed. As a result, some former Telesaver customers were not provided with USTS service for up to six weeks. Moreover, when disgruntled former Telesaver customers sought information from USTS customer service representatives, they were often unable to get through to a representative due to USTS's failure to have adequate staff to handle the chore.[9]

Despite these difficulties, the testimony presented at trial also indicates that USTS was attempting to perform its obligations under the Contract. It sought solutions to the problems it encountered, although it is clear that it failed to live up to the exacting standards that Telesaver demanded. A major part of USTS's problem resulted from the widespread chaos in the telecommunications industry during the period that Telesaver was attempting to transfer its customers to USTS. In the

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[9] Telesaver argues in its post-trial briefs that the quality of the service provided to Telesaver/USTS customers (in terms of the actual clarity of the lines, the time required for a call to go through, the number of mistakenly rejected calls, etc.) was inferior to the industry standard. This allegation in undoubtedly supported in the record insofar as the San Francisco customer base is concerned. No credible evidence exists, however, that USTS service was deficient in terms of line quality outside of the San Francisco area.

wake of the divestiture of AT&T, many new companies were formed seeking to capitalize on the newly-opened market. Telephone customers were unprepared for the onslaught of entrepreneurs—Telesaver included—that were offering long-distance service. Telesaver's own experience is illuminating: it began as a small company, but soon experienced uncontrollable growth, which forced it seek an association with a larger and hopefully more stable company. But the atmosphere that permitted Telesaver to grow so rapidly was also fraught with uncertainty for upstart companies and established giants—such as USTS—alike. An inability to cope with this unprecedented situation is hardly surprising.

As a result of the difficulties encountered in transferring Telesaver's customers to USTS, a drop of between 20 and 25% in the expected usage was realized. This drop in expected usage was attributable both to the loss of existing Telesaver customers and depressed usage of customers who were transferred to USTS. The Court does not credit the testimony of Telesaver's expert Howard Paul regarding the expected usages; his assumption that USTS would experience a "churn" or loss of existing customers of only 2% is overly optimistic in the chaotic climate of the telecommunications industry in the mid-1980s. *See* Pltf. Exh. 941 at 56A.

The parties agree that USTS paid Telesaver $809,601 in cash and $558,814 in transmission credits in exchange for the transferred customers. In all, approximately $3.5 million in usage was generated from March to December 1985. Def. Exh. 338. Telesaver is seeking $549,255 in damages for usage that was not realized due to USTS's alleged breach.

C. Sales

The experience with the sale of new accounts by Telesaver for USTS under the Contract was, if anything, even more unhappy than the experience with customer trans-

fer. What appears most clearly from the testimony presented is that USTS was woefully unprepared to manage the influx of new accounts sold by Telesaver in the first half of 1985. Many of the customers who were sold USTS service by Telesaver experienced significant delays in obtaining telephone service or, in many instances, never received any service at all. As a result, the usage generated on Telesaver-sold accounts was distressingly low. Problems were apparent in both the sales of "code" accounts (also referred to as "dial-up" accounts) and the sale of "equal access" accounts (also referred to as "dial 1" accounts).

1. *Code Accounts*: In the early months of 1985, Telesaver's selling efforts concentrated on USTS code service. Under this type of service, a customer would dial a toll-free number, enter his personal code, and then dial the number he sought to contact. USTS had been selling code service for a number of years, and had in place a routine for processing code orders. The processing involved several steps prior to sending the "starter kit"—which consisted of information along with the toll-free number and access code—to the new customer. USTS had represented to Telesaver that the time needed from receipt of a new customer's order for code service until that customer was actually able to use the service would not exceed two weeks.

The reality, however, was that a serious backlog of orders piled up at USTS offices. The orders, which were processed entirely in-house at USTS, often lingered at USTS for weeks or even months before the customer was sent a starter kit. In addition, USTS lacked adequate procedures to assure that the customer received the starter kits and was using the service. This backlog resulted partially from the lack of adequate procedures at USTS and, most importantly, from the flood of paper associated with the advent of the new and far more acceptable and appealing equal access service. As described

more fully below, when Telesaver and USTS other marketers began selling "dial 1" service, USTS experienced an enormous surge in customer activity. The effect on "dial-up" sales was that resources and attention were shifted away from processing the new dial-up customers to processing new dial 1 customers. Many of the same steps, and many of the same personnel, were required to process customers for both services. The result was that in the Spring of 1985, unprocessed applications for code service accumulated. The problems affected all of USTS independent contractors, not just Telesaver. It was not until the early summer of 1985 that USTS had managed to clear up much of the backlog. *See* Pltf. Exhs. 536 & 454.

Telesaver contends that USTS intentionally concealed the gravity of the situation with regard to the processing of code sales. The testimony clearly indicates that USTS personnel, including Wayne Robins, President of ITT, were well aware of the difficulties. While it is apparent that USTS did not correct the problems as promptly as Telesaver hoped, the evidence also demonstrates that USTS was attempting to rectify the situation and was not, as Telesaver suggests, "secretive and duplicitous" regarding the problems. Telesaver's Reply Memorandum at 37. USTS informed David Brown, Telesaver's Western Regional Manager, and Marshall Sapperstein, Telesaver's Director of Sales and Marketing, of the processing problems. Both Brown and Sapperstein were in fairly constant contact with Goldman, and shared this information with him. Moreover, the problems were so serious early in 1985, and the usage reports so unreliable, that Telesaver and USTS agreed that there would be no reconciliation for February 1985 usage. Instead, Telesaver was permitted to retain its entire advance for the month.

2. *Equal Access Accounts*: As noted above, later in the Spring of 1985, Telesaver—along with many other long-distance telephone marketers—began emphasizing the

sale of "dial 1" service. A customer who had dial 1 service would be able to make long-distance calls in the same manner as before the break-up of AT&T. He would simply dial 1 plus the area code and number that he sought to reach; the long-distance carrier that he had previously selected would bill him for the call.

The processing of these equal access orders was even more complex, and less successful, than the processing of the code orders. While many of the steps in processing dial 1 orders were identical to dial-up orders, USTS also had to communicate with the local "Bell Operating Companies" ("BOCs") in order to get service for dial 1 customers. USTS first processed the order in-house, and then sent a paper order to the appropriate BOC for entry into the BOC's switching software. Different BOCs around the nation required information in different formats in order to be entered into its system. During the early months of equal access service, many long-distance carriers had problems complying with the BOCs' varying and changeable requirements for information on dial 1 customers.

USTS's problems, however, were particularly severe. Testimony indicates that there were tremendous inefficiencies in USTS's handling of the paper-intensive preparation of equal access orders. As with code orders, USTS personnel were not particularly swift in their handling of the orders. More importantly, a number of problems peculiar to USTS's handling of equal access orders were also evident. For example, USTS encountered a great deal of difficulty in properly formatting the information on dial 1 customers for the particular BOCs. Consequently, many of the orders submitted by Telesaver and processed by USTS were never activated by the BOCs because the information transmitted to the BOC from USTS was incompatible with the BOCs switching software. To complicate matters, USTS had no routine method for checking to be sure that orders

that were sent to a BOC were activated by the BOC. As a result, USTS had little idea which orders were activated and which were rejected; its ability to take corrective action was severely hampered.

USTS's own problems were, in part, compounded by Telesaver. In the first month or so of the Sales Agreement, Telesaver was not delivering accurate information on new customers to USTS. As a result, USTS could not enter the customer into its system or transmit the customer's data to the BOC to have the customer cut-over to dial 1 service. Moreover, Telesaver's practice of, occasionally, by-passing USTS and transmitting information on new sales directly to the local BOCs created additional difficulties. This practice, known as "BOCing", resulted in Telesaver not being credited for some usage because USTS would not be able to identify which of its vendors was responsible for the customer. It must be remembered that Telesaver was not an exclusive vendor of USTS's services in the areas in which it served.

As USTS became aware of the problem, and after significant prodding from Telesaver regarding the slow pace of USTS processing of equal access orders, Pltf. Exh. 331, USTS established an "Equal Access Task Force." Pltf. Exh. 329. This committee, established in late April 1985 and headed by USTS's Director of Switch Services Marketing, Nick Labenskyj, was charged with the responsibility of solving USTS's internal problems as well as its problems interfacing with the BOCs, As a short-term solution, it hired an outside vendor to track the equal access orders already placed. As a long-term solution, it recommended the development of an automated system to replace the paper-intensive system being used at the time for communicating with the BOCs. This replacement ssytem, known as a "Local Exchange Carrier" ("LEC") system, would permit USTS to transmit compatible information by way of computer tape rather than paper. The LEC system, however, was very slow in de-

velopment. It was not implemented until September or October 1985 and was not fully operational until April 1986. In the time between its implementation and when it was fully operational, USTS's performance in processing orders was even worse than before the LEC system was used.

Throughout 1985, as USTS was encountering these difficulties, Telesaver and USTS were in fairly constant contact. Leonard Moskowitz, Telesaver's Personnel Director, testified that he personally saw the accumulating paper orders from USTS's vendors at USTS's offices and was told by USTS personnel of the problems they were encountering. Tr. at 857-858. Moreover, the evidence presented at trial indicates that Richard Goldman enjoyed extraordinarily frequent and prolonged conversations with ITT's President, Wayne Robins, in which Goldman complained about USTS's performance and implored Robins to remedy the situation. Goldman's access to USTS management exceeded what would have been expected for an independent vendor and exceeded other vendor's actual access to very senior USTS personnel.

For sales made during the Contract period, USTS advanced Telesaver $695,000. Tr. 297. Under the terms of the original Contract, Telesaver was entitled to $470,944.18 for usage generated from sales prior to the execution of the Fourth Addendum. *See* Def. Exhs. 183, 200, 214, 272, 273, and 300-A; Pltf. Exh. 549.

D. Termination and Renegotiation of the Contract

On July 1, 1985, Wayne Robins of USTS sent a notification letter to Richard Goldman indicating that USTS had determined, pursuant to paragraph 5.8 of the Contract, to terminate the Sales Agreement. Pltf. Exh. 531. After a phone call and letter from Goldman, Robins, on July 3, agreed to rescind the notification. After USTS, on July 11, again threatened to terminate the Sales Agreement and to withhold money that Telesaver claimed

it was due on the Customer Transfer portion of the Contract, Goldman and Robins again spoke and agreed to continue their relationship. Pltf. Exhs. 585 & 586. Over the course of the next several weeks, Telesaver and USTS were in constant contact regarding the difficulties encountered in generating revenues from Telesaver's sales. Finally, on August 29, 1985, Robins sent another notification indicating USTS's plan to terminate the Sales Agreement. Pltf. Exh. 675. In this letter, Robins cited "Telesaver's failure to achieve $110,000 in monthly revenues from new sales for three consecutive months." *Id.* Robins agreed, however, to renegotiate the Sales portion of the Contract. Tr. at 206.

Negotiations that ultimately lead to the Fourth Addendum commenced immediately and proceeded over the next few weeks. In a number of face-to-face and telephone meetings, Robins and Goldman settled on a new structure for payment and for processing sales made by Telesaver.[10] This agreement was finalized in what is known as the Fourth Addendum.

II. The Fourth Addendum Period (Sept. 13, 1985-Mar. 31, 1986)

On September 13, 1985, USTS and Telesaver entered into the Fourth Addendum. Pltf. Exh 1072. The Fourth Addendum amended the original Contract in two significant respects. First, it modified the terms and compensation provision for the Sales Agreement of the Original Contract; second, it resolved parties disputes regarding

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[10] In its Proposed Findings of Facts, Telesaver includes a number of alleged misrepresentations regarding the negotiations leading up to the execution of the Fourth Addendum. In its proposed Conclusion of Law, however, Telesaver sought recovery for quite a different set of misrepresentations. Since Telesaver does not press its claim that any alleged representations by USTS during the negotiations leading up to the Fourth Addendum constituted actionable misrepresentations, the Court will not consider the argument.

monies owed for pre-Fourth Addendum sales activity. The Fourth Addendum did not, however, work any change to the Customer Transfer portion of the original Contract.

A. The Fourth Addendum

Section A of the Fourth Addendum contained the provisions revising the sales relationship. It begins by noting that USTS had planned to terminate the original Contract due to Telesaver's failure to achieve $100,000 in monthly revenues, but that "[t]he parties agree that, rather than termination of the Sales portion of the [Contract], it would be desirable to amend them to take into account changed circumstances." Pltf. Exh. 1072, § A.1-2. Section A goes on to describe new compensation terms and verification procedures to be implemented. Pltf. Exh. 1072, § A.8-9. In addition, the Section A of the Fourth Addendum contained two important procedural provisions. Paragraph 3 supplied the termination clause: "[T]he parties will continue these revised Sales portions of the [Contract] to at least January 31, 1986, and thereafter on a month-to-month basis cancellable on sixty (60) days prior written notice effective January 31, 1986, ..." Pltf. Exh. 1072, § A.3. Paragraphs 5 contained the waiver of all legal claims arising out of the parties experience under the original Contract except for claims of fraud. It provided:

> In specific mutual consideration for the amendment of the Sale portion of the [Contract], the parties further agree that neither shall be liable to the other for any actions taken or not taken (except for fraudulent acts which neither party has reason at this time to believe the other has engaged in) in connection with the Sales portion of the [Contract] up to the date hereof.

Pltf. Exh. 1072, § A.5.

The other significant aspect of the Fourth Addendum was the settlement, in Section B, of outstanding disputes between the parties. Including the footnote. this section reads:

> Telesaver owes USTS amounts by reason of its use of USTS services during the effective period of the [Contract] as well as before that [Contract] entered into force. Telesaver also owes USTS amounts relating to Sales advances taken under the [Contract] prior to September 1, 1985, which have not been and are not likely to be fully offset by sales Commissions for pre-September 1, 1985, sales. In addition, USTS is advancing Telesaver $55,000 (plus a waiver of its right to recover $20,000 for Rochester collections which Telesaver has collected for USTS during the month of August) which USTS is now paying in settlement for all equal access orders previously submitted by Telesaver and not entered by USTS or put into service up to the date hereof.* Finally USTS will become obligated to Telesaver for certain amounts for sales in March through August, 1985, under Section 3.5 of the Sales portion of the [Contract]. Telesaver agrees that except for the $55,000 referred to in this Section B., above, and except for the first payment for preceding month's sales and the second month's payment set forth in Section A.9.2 except as the last portion of 9.1, applies, USTS may offset any monies that become due from it to Telesaver against *any* monies then-owed USTS by Telesaver. Telesaver is not being relieved of any debts due USTS simply because it may at some future time anticipate USTS may be able to

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* With respect to previously unincluded equal access orders supplied by Telesaver, USTS will, to the extent reasonably practicable, include the revenues related thereto in the 6th month's compensation computations relating to April through August sales.

offset such amounts against amounts USTS will owe Telesaver.

Pltf. Exh. 1072, § B.

The Fourth Addendum was signed and dated September 13, 1985, and went into effect immediately.[11]

During the period that the Fourth Addendum was in effect, USTS's performance in processing Telesaver sales was wholly inadequate. The problem that beset USTS during the initial Contract period were, simply, not resolved. Indeed, USTS management manifested little interest in seeking the prompt resolution of their deficiencies during the period that the Fourth Addendum was in effect. The result was that the problems continued to fester and continued to impede USTS's performance of its duties under the Contract.

Difficulties relating to the processing of equal access orders submitted by Telesaver USTS were most evident.[12] As noted above, the LEC system that USTS began to implement in the fall of 1985 was not able to solve the deficiencies in USTS order processing until the spring of 1986. An internal USTS chronology of the imple-

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[11] Telesaver argues that the Fourth Addendum did not actually go into effect until the following Tuesday, September 17, 1985. They assert that a memorandum from Goldman to Mike Sauer of USTS entitled "Proposed Modications [sic] to Fourth Addendum" contains additional terms and clarifications to the Fourth Addendum. Pltf. Exh. 708. However, there is no credible evidence to support the contention that this memorandum is part of the Fourth Addendum or in any way alters its terms.:

[12] Indeed, USTS's own proposed finding of fact number 161 asks that the Court find that "During the Fourth Addendum period, USTS continued to experience the sorts of difficulties noted above, *both internally* and with respect to the BOCs, in implementing equal access orders, including Telesaver orders." Proposed Findings of Fact and Conclusions of Law of Defendant and Counterclaim Plaintiff United States Transmission Systems, Inc. at 61 (emphasis added).

mentation of the LEC system underscores the difficulties that USTS experienced in getting the LEC system up and running. Pltf. Exh. 832. Until January 20, 1986, the system was in what USTS termed "pseudo-production"; this meant that orders submitted by Telesaver were not fully processed for inclusion in the BOCs' system. *Id.* For the months of November and December 1985, neither computer tapes generated by the LEC system nor the paper orders themselves were sent to the BOCs.

As a result of the failure of USTS to properly process Telesaver's equal access orders, USTS was forced to undertake "immediate corrective action" in mid-February 1986 "as insurance that the BOCs did in fact receive all Telesaver orders." *Id.* A new program was then instituted that included additional managerial oversight and redundancy of procedures to assure that Telesaver orders were being received and included by the BOCs.

While USTS was encountering these difficulties with the LEC system, Telesaver orders for equal access service were piling up at USTS's offices. Orders from customers sold by Telesaver would sit *unopened* at USTS offices for up to three weeks. Pltf. Exh. 778. This occurred because of USTS's failure to have in place adequate procedures to handle the flow of work and to have adequate personnel to process the orders. Tr. 230; Tr. 447. In addition, expert testimony, which this Court credits, establishes that USTS failed to have in place adequate management oversight to assure that the job was being properly performed. Basic management controls to track the performance of personnel processing the orders were non-existent. The problems were so acute that in late December 1985, an entire week passed without any processing of Telesaver's equal access orders. While some testimony indicates that part of the

delay in USTS's processing of equal access orders was due to incorrect rejection by the BOCs, particularly NYNEX, *see* Pltf. Exhs. 832 & 922; Def. Exhs. 342 & 343, the entirety of the evidence clearly indicates that the bulk of the problem resulted from inefficiencies and deficiencies at USTS.[13]

Moreover, USTS's responses to Telesaver's inquiries concerning its conspicuous problems were, generally, to downplay the extent of the problems and to refuse Telesaver's offers of assistance. On a number of occasions, Telesaver personnel offered assistance to USTS in processing the equal access orders, but these requests were refused. In addition, Telesaver inquiries regarding the status of orders were often not answered. *See* Pltf. Exhs. 741, 749, & 784.

C. Termination of the Fourth Addendum

On January 28, 1986, Nick Labenskyj telephoned Richard Goldman and informed him that USTS intended to terminate the Fourth Addendum. Pltf. Exh. 796. This call was followed the next day by a letter from Wayne Robins to Richard Goldman formally notifying Telesaver that USTS, pursuant to Paragraph 3 of the Fourth Addendum, would terminate the Sales Agreement effective March 31, 1986. Pltf. Exh. 800. Despite Telesaver's requests to retract the termination or to reform their relationship, USTS terminated the Fourth Addendum as planned at the end of March.

Robins testified that two considerations motivated USTS to terminate the relationship with Telesaver. First, USTS was losing money on its deal with Telesaver; and, second, Telesaver's persistent contacts with USTS per-

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[13] Telesaver's expert, Howard Paul, testified that his former employer, MCI, achieved a successful processing rate of approximately 98%, while USTS achieved a rate of between 10% and 15%.

sonnel at all levels of the organization seeking information on its orders and on USTS's efforts to improve the processing of those orders constituted a drain on USTS's patience and resources. Robins expanded on this explanation in a telephone conversation between himself and Goldman on March 10, 1986. Pltf. Exh. 849; Tr. 278-282; Tr. 1371-79. In this two-hour phone call, Robins again refused Goldman's entreaties to renew the contract. He also stated that one of the reasons that USTS terminated the arrangement with Telesaver was that USTS had failed to budget sufficient money to cover the costs of the advances due Telesaver under the Fourth Addendum.[14] As a result, USTS would have been unable to meet its financial obligations to Telesaver if Telesaver continued to sell USTS equal access service at the same pace.

Robins also offered a second explanation to Goldman. In a comment that the Court finds especially illuminating, Robins told Goldman that considerations other than eking out the largest possible profit in its relationship with Telesaver motivated USTS. Rather, as a large corporation with diverse interests around the globe, maintaining "corporate discipline" was one of his, and USTS's, major priorities. Goldman, an energetic entrepreneur, could not fathom how such considerations could interfere with the pursuit of profit. This mismatch of business philosophies was at the root of many of the problems in the relationship between Telesaver and USTS.

For the two months after Telesaver received notification from USTS, it continued to sell USTS service under

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[14] The compensation scheme of the Fourth Addendum called for a "front-loaded" payment plan in which Telesaver would be advanced money based on expected usage for sales made before those sales actually generated the usage. As a result, USTS was required under the Fourth Addendum to pay Telesaver before USTS had received the income from the actual customer.

the terms of the Fourth Addendum. When final results were tabulated some time later, USTS's problems in processing Telesaver accounts became apparent. Out of 12,125 equal access accounts sold by Telesaver, only 4,733 (39.04%) ever showed any usage. In particular markets, outcomes achieved by USTS were even less impressive. For customers covered by NYNEX, 1,181 of the 1,552 customers sold USTS service by Telesaver never received USTS service. The greatest problems apparently occurred in Rochester, New York, where Telesaver sold 1,348 accounts, but only 113 orders were submitted by USTS to the BOC, and only 79 of those were ever activated, for a yield of 8.4% Pltf. Exh. 1021.

For the entire Fourth Addendum period, USTS advanced Telesaver $1,038,891 under the terms of the Fourth Addendum. *See* Telesaver and Vista's Answers to Amended Counterclaims at para. 21. Telesaver's expert testified, in testimony that this Court credits, that Telesaver was owed commissions of $979,794 for the Fourth Addendum period. Pltf. Exh. 941, p. 68.

Conclusions of Law

As noted above, Telesaver's Amended Complaint is now in four counts: breach of the sales agreement (Count I); fraudulent misrepresentations throughout the parties' relationship (Count II); negligent misrepresentation throughout the parties' relationship (Count III); and breach of the customer transfer agreement (Count V).[15] USTS presents a two-count counterclaim, asserting Telesaver's breach of the original sales agreement (Counterclaim I) and Telesaver's breach of the Fourth Addendum (Counterclaim II). In essence, these counterclaims seek restitution for amounts that USTS alleges it "overadvanced" Telesaver.

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[15] Count IV, seeking rescission, was dismissed by Judge Young earlier in the course of this litigation. *See* page 3, *supra*.

I. Breach of the Sales Agreement

Telesaver's claims under Count I of its Amended Complaint need to be segregated into three time periods. First, the Court will consider Telesaver's claim that USTS breached the Sales Agreement during the Original Contract period; second, the Court will consider Telesaver's claim regarding the Fourth Addendum period; finally, the Court will consider Telesaver's claim regarding the post-contractual period.

A. Original Contract Sales Agreement: Telesaver claims that its pre-Fourth Addendum commissions for the sale of USTS service would have been larger but for USTS's breach of its obligations under the Sales Agreement. This claim, however, was effectively disposed of by Judge Young in his decisions dated July 6, 1988 (reported at 687 F. Supp. 997) and December 1, 1988. In those opinions, Judge Young gave effect to paragraph A.5 of the Fourth Addendum, which exempted both parties from all liability, except for fraud, for acts taken in connection with the Sales Agreement prior to September 13, 1985. *Id.* 687 F. Supp. at 1000. Thus, no cause of action for breach of contract may be maintained for alleged acts or omissions perpetrated by USTS prior to the Fourth Amendment period.[16]

USTS, in its first counterclaim, seeks restitution of amounts that it alleges it overadvanced Telesaver as commissions for pre-Fourth Addendum sales. The evidence presented at trial indicates that USTS advanced Telesaver $695,000, while Telesaver earned only $470,944.18 in commissions for sales under the original Con-

[16] To the extent that Telesaver may state a claim for fraud by USTS prior to September 13, 1985, such a claim is contained in Count II. Fraud cannot be converted into a breach of contract claim. In addition, the Court views Telesaver's argument that USTS breached its obligation to use its "best efforts" to process "previously unincluded equal access orders" as a claim for breach of the Fourth Addendum, and will be considered in that context.

tract. Pursuant to paragraph 5.5(B) of the Contract, USTS is entitled to the difference between the amount it advanced Telesaver and the amount Telesaver ultimately earned. Pltf. Exh. 59, para 5.5(B). This provision survived the Fourth Addendum's settlement provisions. *See* Pltf. Exh. 1072, paras. A.4 & B. Accordingly, USTS is entitled to $224,055.82 in restitution under the original Contract Sales Agreement.

B. Fourth Addendum Sales Agreement: For the Fourth Addendum period, Telesaver alleges that USTS breached both its express obligation under § B of the Fourth Addendum to process "previously unincluded equal access orders," and its implied obligation of good faith and fair dealing in its entire performance under the amended Sales Agreement in the Fourth Addendum. The Court turns first to Telesaver's claim that USTS breached its explicit duties under § B of the Fourth Addendum. Telesaver reads this provision as imposing a "new obligation" on USTS to use its "best efforts" to search out and process Telesaver orders that had been received by USTS but, due to USTS's problems, had not been included on USTS's system. *See* Telesaver's Reply Memorandum at 4-13; Pltf. Exh. 708. The $75,000 settlement, Telesaver asserts, was only to cover those orders irretrievably lost and not subject to activation through the exercise of "best efforts." USTS contends that the settlement in the Fourth Addendum was a clean settlement, the parties sought to start anew on a clean slate, and the Fourth Addendum imposed no new obligations on USTS to affirmatively search for unincluded Telesaver orders and to process those orders.

Telesaver made this same argument in its motion for reconsideration of Judge Young's opinion on the cross-motions for partial summary judgment. Telesaver relied then on a memorandum dated September 17, 1985, from Richard Goldman to Mike Sauer of USTS. In that memorandum, Goldman writes that the parties agreed

that USTS would use its "best efforts to activate all past Telesaver sales as rapidly as possible." Pltf. Exh. 708. Judge Young refused to rely on this memorandum. In his opinion on the motion for reconsideration, he observed that "[t]he uncontroverted evidence . . . is that the parties never agreed to the language in the Goldman memo." Memorandum and Order dated December 1, 1988 at 3. Judge Young, therefore, reaffirmed his prior holding that the Fourth Addendum required USTS to "pay Telesaver $75,000 in settlement for all lost orders which USTS did not process as of September 13, 1985. [The Fourth Addendum] also require[d] USTS to compensate Telesaver for any of these unincluded orders it later *discovers* pursuant to the terms of the prior Agreement." *Id.* (emphasis added). The evidence presented at trial did nothing to undermine Judge Young's conclusion; the credible evidence indicates that USTS's reading of this provision is accurate.

First, there is no credible evidence that the September 17 memorandum was ever intended by both parties to the Fourth Addendum to be part of the Fourth Addendum. It may reflect Richard Goldman's desires, but it does not reflect a meeting of the minds. Thus, any terms different in that memo from the language of the Fourth Addendum must be disregarded. Second, to the extent that § B and its accompanying footnote is ambiguous in what it requires, the Court construes that ambiguity against Telesaver because the evidence produced at trial was that Richard Goldman drafted the pertinent language. Finally, the evidence at trial clearly reveals that the purpose of the Fourth Addendum was to wipe the slate clean between the parties. They were each going to rededicate themselves to making their relationship work. To that end, lingering disputes were put to rest with a lump sum payment by USTS to Telesaver of $55,000 in cash and a release by USTS of claims on $20,000 that Telesaver owed USTS. The language regarding "previously unincluded equal access orders" is best under-

stood as a provision guaranteeing simple fairness to Telesaver: if sales Telesaver made during the original contract period ultimately generate usage, then Telesaver should receive the commissions for those sales according to the pre-Fourth Addendum compensation schedule.

The Court concludes, therefore, that the Fourth Addendum imposed no new explicit obligations on USTS to use its best efforts to process previously unincluded equal access sales. Telesaver's claim that USTS breached such an obligation is, accordingly, without merit.

Telesaver also alleges that USTS breached its implied covenant of good faith and fair dealing by its performance under the Fourth Addendum. Telesaver asserts that it would have received more in commissions had USTS not breached this covenant. Telesaver makes no claim that USTS failed to pay commissions on usage actually generated by Telesaver sales, only that the usage would have been higher—and the corresponding commissions higher—had USTS lived up to its duty.

Under New Jersey law, a party to a contract may state a claim for breach of the implied covenant of good faith and fair dealing. As the court held in *Palisades Properties, Inc. v. Brunetti*, 44 N.J. 117, 130, 307 A.2d 522, 531 (1965) (quoting 5 *Williston on Contracts* § 670 (3d ed. 1961)):

> In every contract there is an implied covenant that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing.'

See Polito v. Continental Casualty Co., 689 F.2d 457, 463 (3d Cir. 1982); *Telesaver*, 687 F. Supp. at 1001; *see also Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917) (Cardozo, J.) ("The law has outgrown its primitive stage of formalism when the precise word was

the sovereign talisman, and every slip was fatal. It takes a broader view today. A promise may be lacking, and yet the whole writing may be 'instinct with an obligation,' imperfectly expressed.").

While the existence of this implied covenant of good faith and fair dealing is well-established, its contours have never been particularly well-defined. The parties here offer very different visions of the duty. Telesaver asserts that the duty requires USTS to live up to "industry standards" in its performance. *See* Telesaver Proposed Conclusion of Law No. 8. USTS offers a far less rigorous standard; it asserts that the duty of good faith and fair dealing is breached only by "bad faith" nonperformance. *See* USTS Memorandum in Opposition to Telesaver's Proposed Findings of Fact and Conclusions of Law at 9. As the Court reads New Jersey law, the truth lies somewhere between these positions. In *Schultze v. Chevron Oil Co.*, 579 F.2d 776 (3rd. Cir. 1978), the court applied New Jersey's duty of good faith and fair dealing to a dispute between a gasoline station franchisee and an oil company. Dissenting from the court's affirmance of a directed verdict in favor Chevron, Judge Adams offered a comprehensive overview of New Jersey's implied duty. He concluded:

> The New Jersey courts thus no longer conceive of a contract solely as a private treaty in a bellicose state of nature, conferring privileges to be used at will out of avarice, pique or spite. Rather, a contract, particularly one involving a long-term relationship which places the welfare of one party in the hands of the other, is understood to reflect the ethical tenor of the society in which the contract is formed, and creates the expectation that the powers it grants will be reasonably and equitably exercised.

Id. at 784 (footnotes omitted). Thus, the duty of good faith and fair dealing imports a obligation of reasonableness into every contract and permits a court to take

cognizance of all the equities in determining whether that contract has been breached. *See Eskin v. Acheson Mfr. Co.*, 236 F.2d 135 (3d Cir. 1956) (applying New Jersey law) ("uncertainties of the abnormal economy and their impact on reasonable business behavior must be viewed as basic qualifying circumstances").

USTS argues that the evidence adduced in this case indicates that it fulfilled its obligation to act in good faith. In support, USTS especially emphasizes the front-loaded nature of the compensation scheme between USTS and Telesaver which, USTS asserts, created a "built-in guarantee that USTS would make good faith efforts to process Telesaver sales and promote usage from them." USTS Post-Trial Memorandum of Law at 15. USTS also stresses the general upheaval in the telecommunications industry during the duration of the Fourth Addendum.

While USTS's characterization of its incentive and of the atmosphere in which it was operating is accurate, its argument that these background facts indicate that it performed its obligations under the Sales Agreement in the Fourth Addendum cannot withstand scrutiny. The evidence presented at trial indicates that USTS's performance is attributable to more than the fact that USTS was a poorly-managed company struggling to survive in turbulent and unchartered waters. Rather, USTS specific failures to correct the deficiencies that were apparent during the initial contract period amounts to a knowing failure to take steps necessary to fulfill its obligations under the Fourth Addendum. Put simply, the parties agreed to start fresh under the Fourth Addendum; problems encountered from December 1984 until September 1985 were put behind; a new relationship was to begin. The evidence produced at trial indicates, however, that USTS did virtually nothing to assure that the previously encountered problems would not reappear. Rather than acting with any diligence to solve the massive internal problems at USTS, USTS allowed the problems to fester.

This cannot be regarded as reasonable behavior. The Court finds that it amounts to a breach of the duty of good faith and fair dealing.

The Court turns, then, to the damages suffered by Telesaver as a result of this breach. Both parties agree that USTS advanced Telesaver $1,038,891 for Fourth Addendum sales. Telesaver's expert, Howard Paul, produced a lengthy report during the pretrial stage of the litigation in which he opined that Telesaver would have $979,794 if USTS had not breached its obligations under the Fourth Addendum's sales agreement. Mr. Paul defended that opinion, and did not deviate from it, at deposition. The Pretrial order submitted by the parties included Mr. Paul's damage figure. And Mr. Paul testified, on his first day of testimony, that the figure in his report was accurate. On the morning of his second day of testimony, however, Mr. Paul offered a revised calculation of Telesaver's damages. He testified that the $979,794 figure should be multiplied by a factor of 3.7 to better reflect expected usage, yielding an expected commission of $3,625,238.

This revised opinion is wholly lacking in credibility and the Court does not credit Mr. Paul's testimony regarding it. It is evident that the original opinion of damages presented in the expert's report and relied upon up until the morning of the seventh day of trial represents the expert's "best estimate" of Telesaver's damages. Tr. 1166. Since both parties agree that Telesaver was advanced $1,038,891, Telesaver actually suffered no direct damages as a result of USTS's breach. On the contrary, Telesaver was advanced $59,074 more than it was entitled to receive had USTS not breached its duty of good faith in the Fourth Addendum.

Telesaver also seeks damages for lost sales as a consequence of USTS's failure to live up to its obligations under the Fourth Addendum. In particular, Telesaver alleges that it had to lay off personnel and close offices as

a result of USTS's failure to perform; if these offices had remained open, Telesaver argues, more sales of USTS service would have been made, more customers would have generated usage, and more commissions would have been due Telesaver.

This claim is clearly one for consequential damages. *See Kearney & Trecker Corp. v. Master Engraving Co., Inc.*, 107 N.J. 584, 527 A.2d 429, 433 (1987); *Seaman v. United States Steel Corp.*, 166 N.J. Super. 467, 400 A.2d 90, 93 (Super. Ct. App. Div.), *cert. denied*, 81 N.J. 282, 405 A.2d 826 (1979); *see also* Pretrial Order at 74-75 (plaintiff's characterization of this claim as one for consequential damages). In Judge Young's opinion, the consequential damages disclaimer contained in the Original Contract was found to be valid and enforceable. *Telesaver*, 687 F. Supp. at 998-99. Accordingly, Judge Young granted summary judgment to USTS on Telesaver's claim for consequential damages. That decision stands as the law of this case. Telesaver's demand for damages for sales not made as a consequence of USTS's breach must be rejected.

C. Post-Fourth Addendum Lost Sales: Telesaver seeks $10,519,212 (plus an increment to account for time until judgment) for "lost commissions on lost sales after the contract period." Quite obviously, this amounts for a claim for consequential damages that is barred by Judge Young's ruling. In any event, the evidence presented at trial indicates that USTS terminated the Fourth Addendum in strict adherence with its terms. Accordingly, Telesaver did not demonstrate that its relationship with USTS should have continued one day longer than it did. Telesaver's demand for damages for the post-contractual period is denied.

II. Fraudulent and Negligent Misrepresentation

Counts II and III of the Amended Complaint bring claims for fraudulent and negligent misrepresentation, respectively. Telesaver contends:

> USTS continually misrepresented the nature and magnitude of USTS' internal problems, the then-existing status of order processing, the then-existing status of service being provided, the degree of responsibility of the Bell Operation Companies for the low usage on Telesaver accounts, and the nature and extent of actions that USTS took to correct the problems which may have existed.

Telesaver's Reply Memorandum in Support of Plaintiffs' Proposed Findings of Facts and Conclusions of Law at 103.[17] These alleged misrepresentations form the basis for both the negligent and fraudulent misrepresentation counts.

To prevail in an action for fraudulent misrepresentation under New Jersey law, the plaintiff must demonstrate that the defendant made a " 'material misrepresentation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, *resulting in reliance by that party* to his detriment.' " *Ramapo Bank v. Bechtel*, 224 N.J. Super. 191, 539 A.2d 1276, 1279 (Super. Ct. App. Div. 1988) (citation omitted) (emphasis added). In addition, fraud must be established by clear and convincing evidence. *Albright v. Burns*, 206 N.J. Super. 625, 503 A.2d 386, 389 (Super. Ct. App. Div. 1986). Negligent misrepresentation consists of "an incorrect statement, negligently made and *justifiably relied upon*" *H. Rosenblum, Inc. v. Adler*, 93 N.J. 324, 461 A.2d 138, 142-43 (1983) (emphasis added). An essential element of

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[17] The Court notes that some variance exists between the alleged fraudulent misrepresentations claimed in Telesaver's post-trial memoranda and the alleged fraudulent misrepresentations alleged in Telesaver's Amended Complaint. *Compare* Amended Complaint para. 50, *with* Telesaver's Proposed Conclusion of Law No. 11. Under the Federal Rules of Civil Procedure, fraud must be pled "with particularity." Fed. R. Civ. P. 9(b). Nevertheless, the variance that exists is not, as USTS argues, so great as to preclude consideration of Telesaver's claims. *See supra*, note 10.

each cause of action is that the plaintiff reasonably relied on the alleged misrepresentations. Here, even if the Court assumes that USTS made misrepresentations (and the Court does not believe that the record could sustain such a finding), the evidence presented at trial clearly indicates that Telesaver's reliance on such misrepresentations was not reasonable.

One of the indelible realities of the entire relationship between Telesaver and USTS was the unusually frequent contact that Telesaver personnel—especially Richard Goldman—had with senior USTS personnel—especially Wayne Robins. Goldman was in almost daily contact with Robins, seeking resolution of the problems USTS was encountering with the handling of Telesaver's account. Goldman's knowledge of the entire gamut of USTS's problems was extensive; both Goldman and people who worked with Goldman had first-hand knowledge of the backlogs at USTS and of USTS's attempts to remedy the situation. The testimony clearly indicates that Goldman was informed of the problems at USTS by his subordinates. *See* testimony of Sapperstein, Brown and Moskowitz. In short, given the fact that Telesaver had abundant knowledge of the problems dogging USTS, Telesaver cannot claim that it reasonably relied on any alleged representations made by USTS of successful performance. Telesaver's fraudulent and negligent misrepresentation counts, therefore, must be denied.

III. Breach of the Customer Transfer Agreement

Telesaver's claim that USTS breached the Customer Transfer portion of the Contract is similar to its claim under the Sales portion of the Fourth Addendum. Telesaver asserts that USTS breached its implied duty of good faith and fair dealing in the performance of its obligations and that this breach led to lower than expected usage by former Telesaver customers transferred to USTS. Telesaver is not alleging that USTS breached

any explicit obligations contained in the Contract or that USTS failed to compensate Telesaver properly for actual usage by former Telesaver customers transferred to USTS.[18] Rather, Telesaver's claim is one for commissions for unrealized usage.

As noted above, New Jersey law reads a duty of good faith into every contract. *Palisades Properties, supra.* The Court is thus called upon to consider the entire relationship between the parties to determine whether the alleged breaching party's performance was reasonable in the circumstances. Taking into account the totality of the circumstances surrounding USTS's performance under Customer Transfer portion of the Contract, the Court concludes that USTS did not breach its implied covenant of good faith and fair dealing in its performance under this portion of the Contract. Simply put, failing to fulfill the expectations of one's contractual partner does not amount to breach of the duty of good faith.[19] Inept handling of problems does not amount to breach of the duty of good faith. So long as a good faith effort was made, failure alone does not create liability. After all the evidence is considered, the Court finds that USTS's failures were not the result of a lack of good faith effort.

Most importantly, the nature of the telecommunications industry during the time that Telesaver was transferring its customers to USTS must not be overlooked. Chaos reigned supreme. The break-up of AT&T created a situ-

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[18] Telesaver does assert that USTS breached the explicit duty, contained in paragraph 8.3 of the Contract, to provide network quality "comparable [to] industry standards." The Court's finding of fact that the quality of USTS service was not below industry standards, however, prevents recovery on this claim.

[19] It is important to recognize, in this regard, that satisfaction of the duty of good faith is judged on an objective scale. The Court has little doubt that USTS failed to live up to Richard Goldman's *subjective* standard of good faith. Such a failure, however, does not amount to a breach of the duty of good faith.

ation in which new long distance carriers were competing for the business of confused and disoriented customers. These new carriers, including USTS, had no established opearting procedures to guide them through this period. The competition for customers among many long distance companies was intense. In such an environment, the inability of one carrier to capitalize on the opportunities presented is not evidence of a lack of good faith effort to succeed. The less-than-expected usages complained of are readily explainable as the natural result of the chaotic atmosphere, the intense competition for customers, and customers' lack of familiarity with USTS code service.

The internal problems that beset USTS during the contract period certainly had a negative impact on the ultimate commissions earned by Telesaver. The Court finds strong evidence to support the contention that USTS's problems led customers to switch to other carriers or to reduce their use of USTS service. Nevertheless, the Court also finds that USTS made good-faith attempts to live up to its end of the bargain. Its sought solutions for its problems and attempted to resolve the apparent inefficiencies. Given that USTS was operating in an "abnormal economy," *Eskin, supra,* its inability to perform at standards typical—and perhaps expected—for a major multinational corporation does not establish a breach of the duty of good faith and fair dealing. Telesaver's claim under Count V of the Amended Complaint, therefore, must be denied.

IV. USTS's Counterclaim Against Richard Goldman

In its counterclaim, USTS sought recovery from Richard Goldman individually as well as from Telesaver and Vista Technologies. At trial, however, USTS presented no evidence to support a finding of liability against Goldman individually. Moreover, USTS's proposed findings of fact and conclusions of law do not ask the Court to find that Goldman should be held personally liable for

the restitution USTS seeks. Accordingly, the Court will dismiss USTS's counterclaims insofar as they seek recovery against Richard Goldman individually.

Summary

The central fact underlying this entire litigation was the manifest clash of corporate cultures between Telesaver and USTS. Simply put, the two parties envisioned the world differently, imagined the future differently, and expected different things from their contractual partners. This mismatch effectively doomed the relationship from the outset. While it is clear that USTS could have done much more to make the relationship work, the eventual failure of this venture was primarly the inevitable outcome of a fundamental mismatch of business perspectives.

Judgment will be entered in favor of Telesaver on its claim under Count I of Amended Complaint for USTS's breach of its duty of good faith and fair dealing during the Fourth Addendum period. Judgment will be entered in favor of USTS on the remainder of Count I and on Counts II, III, and V. Judgment will also be entered in favor of USTS on its two Counterclaims. As a result, Telesaver will be ordered to pay to USTS $283,129.82. A Judgment Order will accompany this Opinion.

/s/ Norman P. Ramsey
NORMAN P. RAMSEY
United States District Judge

Dated: March 6th, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. R-86-2300

TELESAVER, INC., *et al.*,
Plaintiffs/Counterclaim Defendants

v.

UNITED STATES TRANSMISSION SERVICE, INC.,
Defendant/Counterclaim Plaintiff

JUDGMENT ORDER

[Filed Mar. 6, 1990]

In accordance with the Opinion of the Court dated March 6th, 1990, and filed in the above-captioned case, it is this 6th day of March, 1990, by the United States District Court for the District of Maryland,

ORDERED AND ADJUDGED:

1. That judgment is hereby entered in favor of plaintiffs and against defendant on Count I of the Amended Complaint for defendant's breach of the duty of good faith and fair dealing under the Fourth Addendum;

2. That judgment is hereby entered in favor of defendant and against plaintiffs on the remainder of Count I of the Amended Complaint and on Counts II, III, and V of the Amended Complaint;

3. That judgment is hereby entered in favor of counterclaim defendant on both Counts of the Amended Counterclaim;

4. That counterclaim plaintiff's prayer for recovery against counterclaim defendant Richard Goldman is DISMISSED; and

5. That the remaining counterclaim defendants pay to defendant/counterclaim plaintiff the sum of $283,129.82 in restitution.

/s/ Norman P. Ramsey
NORMAN P. RAMSEY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Chambers of
Joseph H. Young
Judge
Baltimore, Maryland 21201

March 1, 1988

Harry M. Rifkin, Esq.
Semmes, Bowen & Semmes
250 West Pratt Street
Baltimore, Maryland 21201

Re: Telesaver, Inc., et al. v.
United States Transmission System,
Inc.—Civil No. Y-86-2300

Dear Mr. Rifkin:

I acknowledge your letters dated February 23, 1988.

As indicated in my letter dated February 17, 1988, a jury demand in an amended pleading is not revived unless the amended pleading raises triable issues of fact not raised in the original pleading.

Your letter indicates that the request for jury trial is not based on any new facts. Accordingly, this case will go to trial as scheduled as a nonjury trial.

Very truly yours,

/s/ Joseph H. Young
JOSEPH H. YOUNG
United States District Judge

cc: Michael D. Berman, Esq.
John M. Aerni, Esq.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3502

TELESAVER, INCORPORATED; VISTA TECHNOLOGIES, INCORPORATED,
Plaintiffs-Appellants

v.

UNITED STATES TRANSMISSION SYSTEMS INCORPORATED,
Defendant-Appellee

and

RICHARD J. GOLDMAN,
Counterclaim Defendant

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

[Filed February 21, 1991]

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Phillips with the concurrence of Judge Niemeyer and Judge Merhige.

For the Court,

/s/ John M. Greachen
Clerk